

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN GARRETT SMITH,

Plaintiff,

v.

J COLEMAN,

Defendant.

CASE NO. 3:20-cv-05319-RBL-JRC

ORDER TO SHOW CAUSE OR
AMEND PROPOSED COMPLAINT

This matter is before the Court on plaintiff's application to proceed *in forma pauperis*. See Dkt. 1. Plaintiff seeks to bring two types of claims—claims calling into question the validity of his underlying conviction, which must be brought in a habeas corpus petition, and claims under the Eighth Amendment related to his conditions of confinement, which must be brought in a 42 U.S.C. § 1983 matter. Yet, plaintiff disavows that he is bringing either type of action.

If he wishes to proceed on these claims, plaintiff must file a § 1983 complaint or habeas petition under 28 U.S.C. § 2254 on or before May 29, 2020. If plaintiff fails to do so or if his amended complaint or petition fails to comply with the Court's Order, the undersigned will

1 recommend dismissal of this matter. The Court will not grant plaintiff's *in forma pauperis*
2 application unless plaintiff complies with this Order.

3 4 **DISCUSSION**

5 Under 28 U.S.C. § 1915(e)(2)(B), this Court may dismiss a complaint at any time if
6 plaintiff proceeds or seeks to proceed *in forma pauperis* and fails to state a claim upon which
7 relief can be granted.

8 Plaintiff has requested to proceed *in forma pauperis*, but his complaint fails to state a
9 claim upon which relief can be granted and appears to be frivolous. Plaintiff specifically states
10 that he does not wish to bring either a 42 U.S.C. § 1983 claim or a petition for habeas corpus.
11 *See* Dkt. 1, at 4.

12 Plaintiff appears to intend to bring state law tort claims in a case arising under this
13 Court's diversity jurisdiction. *See* Dkt. 1, at 2. His claims are deficient for the reasons identified
14 herein.

15 First, although plaintiff seeks to bring a non-§ 1983 claim for cruel and unusual
16 punishment, there is no freestanding cause of action for a constitutional violation. Rather,
17 plaintiff must proceed under a statute providing for a private right of action, such as 42 U.S.C. §
18 1983. As noted, plaintiff disavows that he intends to bring such a cause of action. Dkt. 1, at 4.

19 Second, plaintiff appears to challenge the facts underlying his continued imprisonment,
20 asserting that he is imprisoned on false charges and a false conviction. *See* Dkt. 1, at 2. As this
21 Court has already informed plaintiff:

22 To obtain federal judicial review of a state conviction or sentence, a party must file
23 a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and must first
24 exhaust his state judicial remedies. *See Preiser v. Rodriguez*, 411 U.S. 475, 500
(1973).

1 Dkt. 5, at 2–3, *Smith v. Haynes*, 3:18-cv-5144-RBL (March 2, 2018).

2 If plaintiff wishes to proceed with claims that effectively attack his underlying conviction
3 and sentence, he must proceed by filing a § 2254 habeas petition, not by bringing some other
4 type of civil action.

5 Plaintiff's claims also fail to the extent that he relies on federal criminal statutes that he
6 alleges were violated. Neither 18 U.S.C. § 3 nor § 4 creates a private right of action. *E.g.*
7 *Pankey v. Webster*, 816 F. Supp. 553, 559 (W.D. Mo. 1993); *Gipson v. Callahan*, 18 F. Supp. 2d
8 662, 668 (W.D. Tex. 1997). Although plaintiff cites to 18 U.S.C. § 1030 (concerning computer
9 fraud), he alleges no facts related to any form of fraud perpetuated using a computer. *See*
10 *generally* Dkt. 1. 18 U.S.C. 1515, which plaintiff also cites, is merely a definitional statute.

11 **CONCLUSION AND DIRECTIONS TO PLAINTIFF AND CLERK**

12 Because plaintiff's claims under the Eighth Amendment are the type of claims that
13 should typically be brought in a § 1983 complaint, plaintiff is granted to leave to file a § 1983
14 complaint on the form provided by this Court. Plaintiff should be aware that if he intends to
15 pursue a § 1983 civil rights action in this Court, he must file an amended complaint and within
16 the amended complaint, he must write a short, plain statement telling the Court: (1) the
17 constitutional right plaintiff believes was violated; (2) the name or names of the person or
18 persons who violated the right; (3) exactly what each individual or entity did or failed to do; (4)
19 how the action or inaction of each individual or entity is connected to the violation of plaintiff's
20 constitutional rights; and (5) what specific injury plaintiff suffered because of the individuals'
21 conduct. *See Rizzo v. Goode*, 423 U.S. 362, 371–72, 377 (1976).

22 Plaintiff shall present the amended complaint on the form provided by the Court. The
23 amended complaint must be legibly rewritten or retyped in its entirety, it should be an original
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1 and not a copy, it should contain the same case number, and it may not incorporate any part of
2 the original complaint by reference. The amended complaint will act as a complete substitute for
3 the original complaint, and not as a supplement. An amended complaint supersedes the original
4 complaint. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), *overruled in part on*
5 *other grounds*, *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012). Therefore, the
6 amended complaint must be complete in itself and all facts and causes of action alleged in the
7 original complaint that are not alleged in the amended complaint are waived. *Forsyth*, 114 F.3d
8 at 1474. The Court will screen the amended complaint to determine whether it contains factual
9 allegations linking each defendant to the alleged violations of plaintiff's rights. The Court will
10 not authorize service of the amended complaint on any defendant who is not specifically linked
11 to a violation of plaintiff's rights. Moreover, the Court will not grant plaintiff leave to proceed *in*
12 *forma pauperis* unless he otherwise satisfies the requirements of 28 U.S.C. § 1915.

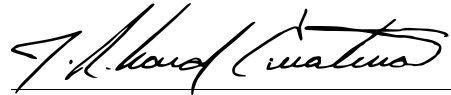
13 If plaintiff fails to file an amended complaint or fails to adequately address the issues
14 raised herein **on or before May 29, 2020**, the undersigned will recommend dismissal of this
15 action pursuant to 28 U.S.C. § 1915.

16 Plaintiff may also choose to file a habeas petition under § 2254. However, plaintiff is
17 warned that if he chooses to do so, his petition will be subject to dismissal if plaintiff has already
18 brought a habeas petition challenging his conviction or sentence unless plaintiff obtains
19 permission to bring a second or successive petition.

20 The Clerk is directed to send plaintiff the appropriate forms for filing a 42 U.S.C. § 1983
21 civil rights complaint and for filing a 28 U.S.C. § 2254 petition. The Clerk shall renote
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1 petitioner's *in forma pauperis* motion for consideration on May 29, 2020. Plaintiff's response to
2 this show cause order is due on or before May 29, 2020.

3 Dated this 6th day of May, 2020.

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7 J. Richard Creatura
8 United States Magistrate Judge
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